No. 12864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C B S Steel and Forge, a corporation,

Appellant,

vs.

Gordon W. Shultz, Ernest Puetz, Lee McCoy, Howard Lane, and Harold W. Gentis,

Appellees.

On Appeal From the United States District Court for the Southern District of California Central Division

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APPELLANT'S REPLY BRIEF.

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Preliminary Statement.

Appellees McCoy, Lane and Gentis have not filed any brief, although the time therefore has expired; they are therefore in default. Appellees Shultz and Puetz have not controverted Point I of appellant's opening brief. It may be taken as conceded, then, that appellees Shultz and Puetz are liable to appellant in the amount of any judgment recovered by appellees Lane and Gentis (plaintiffs below) against appellant (defendant and third-party plaintiff below). Shultz and Puetz have not conceded appellant's Point III, but they have not cited any authority to show that any independent ground of federal jurisdiction was necessary as between appellant and appellees Shultz and Puetz in order for appellant to maintain its third party complaint against them.

Appellees Shultz and Puetz now contend only (1) that the third party complaint does not state a claim upon which relief can be granted, and (2) that the claim set forth in the third party complaint is not the proper subject of third party complaint. Our argument will respond to those contentions.

ARGUMENT.

I.

The Third Party Complaint States a Claim Upon Which Relief Can Be Granted.

Appellees Shultz and Puetz complain that the third party complaint alleges that *if* appellant is liable to appellees Lane and Gentis it is because of the negligence or other misconduct of appellees Shultz and Puetz. But such an allegation is amply supported by authority and indeed is required by the circumstances of this case.

An allegation is not objectionable for being stated in hypothetical form. See, *e. g.,* Official Form No. 20, promulgated by the Supreme Court, stating in part as follows:

> ". . . *If* defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. . . ." (Emphasis supplied.)

In the instant case appellant was obliged to allege its third party claim in hypothetical form. In its answer to the complaint appellant denied liability [R. 8, 11]. Out of prudence, however, appellant has thought fit to implead Shultz and Puetz so that if plaintiffs recover anything from appellant, appellant will be enabled to recover judgment against Shultz and Puetz therefor in the same action. Appellant cannot allege positively that Shultz and Puetz

were negligent in record-keeping and payment of overtime compensation. Appellant does not believe that they were guilty of negligence or other misconduct. To allege that they were would constitute a confession of liability contrary to the theory of appellant's defense to the complaint. Certainly a third party plaintiff should not be required to confess liability to the plaintiff in order to maintain a third party complaint.

Since appellant's primary position is that Shultz and Puetz were not guilty of negligence or other misconduct of course appellant is unable to allege negligence or misconduct on their party with particularity. In any event, the general allegation of negligence is sufficient.

Hardin v. Interstate Motor Freight System, 26 Fed. Supp. 97.

And even if the third party complaint had been in any way objectionable for vagueness or ambiguity, dismissal was not proper. Appellees could have, but did not, move for a more definite statement under Rule 12(e), Federal Rules of Civil Procedure.

Judgment of dismissal would have been proper only if appellant could not conceivably be entitled to recover under any state of facts which could be proved in support of the third party complaint.

Sparks v. England, 113 F. 2d 579;

Equitable Life Assurance Society v. Saftlas, 35 Fed. Supp. 62.

By this standard it was obviously erroneous to dismiss the third party complaint.

II.

Appellant's Claim Against Appellees Shultz and Puetz Is the Proper Subject of Third Party Complaint Under Rule 14.

Appellees Shultz and Puetz contend that third parties may be impleaded only when the plaintiff's case against defendant and third party plaintiff would *ipso facto* establish liability of third parties defendant without additional proof. But there is nothing in the rules or the cases to support any such limitation on third party practice.

Contrary to appellee's argument, the case of *Greenleaf v. Huntington R. R.,* 3 F. R. D. 24, was not one where the liability of the defendant necessarily involved the liability of third parties defendant. There the complaint imputed defendant railroad's negligence to either the train crew, the engineer, or the conductor, in the alternative. Yet the engineer and the conductor were properly impleaded as third parties defendant.

In *Barkeij v. Don Lee,* 34 Fed. Supp. 458, the complaint alleged patent infringement. The defendant impleaded its assignor as third party defendant upon a claimed liability under a license and indemnity agreement. Of course, that involved additional issues as to the execution and construction of the agreement.

In *Schram v. Roney,* 30 Fed. Supp. 458, the main action was to recover upon the liability of defendant stockholder under the National Bank Act. The defendant brought in his transferor as third party defendant, thereby introducing new issues as to the circumstances of the transfer.

In *Crum v. Appalachian Power Co.,* 29 Fed. Supp. 90, the defendant in a negligence case brought in as third party defendant an independent contractor who was al-

leged to be liable under a contract which was of course not involved in the main cause of action.

Nor is it necessary that the third party complaint be against persons who are liable to plaintiff. See Rule 14, also two cases cited by appellees: *Kelly v. Penna. R. R.*, 7 F. R. D. 524; *Pearce v. Penna. R. R.*, 7 F. R. D. 420. If *United States v. Jollimore,* 2 F. R. D. 148, is read otherwise it is plainly wrong.

Appellants Shultz and Puetz exaggerate the extent to which litigation of the third party complaint would expand the original scope of the action, and they overlook the vastly more troublesome circuity of action which would be required if their contentions here were to prevail.

If appellant corporation is liable to plaintiffs for overtime compensation, liquidated damages, or attorney fees it must be because of some act or omission of the corporation, which necessarily means some act or omission of its agents. In the instant case Shultz, Puetz and McCoy were the responsible agents of the corporation during the period involved. Any evidence which plaintiffs may adduce to establish the liability of appellant corporation will tend to show that such liability was caused by the negligence or other misconduct of appellees Shultz, Puetz, or McCoy in failing to cause the corporation to keep correct time records or to pay overtime compensation promptly when due. That will tend to establish appellant's case against Shultz, Puetz or McCoy, who should be required to defend themselves now.

The alternative, which is most undesirable, is to let the main action go on against appellant alone. Then, if plaintiffs recover from appellant, appellant will be required to bring a new action against Shultz, Puetz and McCoy,

in which they may litigate all over again the issue of fault which by then will have already been tried once and resolved against appellant in the instant action. Such circuity of action would be most wasteful and unfair, and it is not required by Rule 14, which was intended to prevent just that sort of thing.

Conclusion.

It is submitted that the third party complaint states a claim upon which relief can be granted, that the claim is the proper subject of third party complaint, that the trial court erred in giving judgment of dismissal of the third party complaint, and that the judgment should be reversed.

Respectfully submitted,

Richard A. Perkins,
Attorney for Appellant.